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AT the SITTINGS, holden in and for the City and County of New-York, at the City Hall of the said City, on Monday, the 30th day of November, in the Year of our Lord one thousand eight hundred and eighteen—

BEFORE

The Honourable

SMITH THOMPSON, *Chief Justice of the Supreme Court of Judicature of the State of New-York.*

M'KESSON, *Clerk.*

(PROTRACTED COURTSHIP—PROMISE OF MARRIAGE—COMPROMISE—DOUBLE-DEALING.)

JANE MOUNT *vs.* JAMES BOGERT.

HOFFMAN, OGDEN, and PRICE, *Counsel for the Plaintiff.*

EMMET, WELLS, and C. BOGERT, *Counsel for the Defendant.*

During the pendency of a suit, D., a relation of B., the Defendant, met him and commenced a conversation relative to the suit, and talked of a compromise between B. and M., the Plaintiff, as if authorized by her, though, in fact, he was not. In the course of that conversation, B. (as D. believed) admitted the contract sought to be enforced by the action, and also offered a specific sum, by way of compromise, to D. It was held that the admission and offer of B. might be given in evidence, and were to be viewed rather in the light of a *confession*, than the *mutual offers of compromise between parties.*

A promise of marriage may be inferred from circumstances, and need not be proved by positive testimony.

Where a maiden woman of forty-three years of age, received the visits of a bachelor of fifty-three, as a suitor, for thirteen years, but during this time, whenever she spoke of him, declared she would never marry him, and represented him, on all occasions, in terms of derision and contempt; and where, after the expiration of that lapse of time, and before the commencement of the suit, the bachelor, not knowing the double-dealing of the maid, promised to marry her, but, afterwards, having heard of her aspersions, refused—though the Jury are *obliged* to render a verdict against him for this breach of his contract, yet, they will not amerce him in heavy damages.

In such case, where the bachelor had offered the maid, by way of compromise, after the commencement of the suit, $1600, which offer she rejected, the Jury gave her but $400.

The attention of the fair is invited to the following case. It affords a memorable example for their instruction. Here they may find the sad effects arising from duplicity towards a suitor, one who above all others is entitled to an open ingenuous conduct from the woman who receives his addresses. Against such a one, the windows to her heart ought never to be closed. She has no right to hold even the language of common civility *to him*, while she indulges herself in bitter sarcasms and expressions of contempt concerning him, *to others.* The Plaintiff did this. She permitted the attentions of the Defendant to be continued a number of years: he contracted to marry her; but discovering her feelings towards him, to the honour of manhood be it spoken, he dissolved the connexion, and met her in a Court of Justice. The Court and Jury heard: they frowned indignant at the recital of her perfidy; and though the rigour of the law would not permit them to absolve him from his engagement, yet the law did invest them with a sound discretion as to *the amount of the damages.* And the woman who had been offered $1600 by way of compromise, was dismissed with *one fourth* of that sum.

This was an action for a breach of promise of marriage. The writ was returnable in May term, 1817, and the damages being laid originally at $5,000, were increased in the declaration, by a stipulation between the attorneys, to $10,000.

Price opened the case on behalf of the Plaintiff, by stating that the Defendant, a bachelor, now of fifty-four years of age, in the year 1802 became acquainted with

the Plaintiff, and visited her as a suitor until the year 1817. She was a mantua-maker by profession, and is now thirty-six years of age. The Defendant had lately inherited an estate of $200,000; and although, during the time of his courtship, he had promised to marry her, and induced her to part with the little money she had amassed by her industry, in the purchase of furniture preparatory to keeping house, yet, adhering to the advice of his relations, who were, from avaricious motives alone, averse to the match, he finally refused to perform his contract.

The Counsel stated, that an express promise, in cases of this description, could scarcely if ever be shown; nor was this by law necessary; it was sufficient to adduce circumstances, from which a promise could be rationally inferred by the Jury.

In the progress of the cause, it would appear, however, that the Defendant, after the commencement of this suit, had made a proposition for a compromise, wherein he offered the Plaintiff $1600; but, considering herself an injured woman, she rejected the pitiful offer; and now relied on a Jury of her country for a redress of her wrongs.

REBECCA MAVERICK sworn.

Price. How long have you known Miss Mount?

A. Seven years next May; at that time she boarded with me eighteen months.

Q. During this time, did Mr. Bogert visit her as a suitor?

A. Yes, constantly, and he used to call on her to go to Church; but I don't know whether she went with him. James R. Stewart afterwards lived at our house, and the Plaintiff boarded with him about six months, during which time the Defendant used to visit her, and they were often alone.

Q. From any thing you saw while he was visiting her, did you believe they were about to be married?

By the Court. That question will not do: you must first get at the *facts*, and leave it to the Court and Jury to draw their own inferences.

Q. Were they frequently alone?

A. They were sometimes alone.

Q. Do you know the age of either?

A. I do not.

Q. At what place did you live at this time?

A. In Liberty-street.

Q. Do you know of her purchasing any clothes or articles of household furniture about this time?

A. I do not know any thing on this subject, except from what she told me.

By one of the Jurors. How often did he visit her at your house?

A. I have seen him there three or four times a week; and sometimes five or six times; he used to walk out and come home with her; and while she was at Stewart's, I was told by the family that he was frequently there.

Cross-examined by Wells. Have you heard him say that he visited her as a suitor?

A. I have not.

Q. Had she a separate room in your house?

A. Yes; during the winter, about three or four weeks, she hired a separate room of me, and he used to visit her there; but for the remainder of the time he used to sit with her in my parlour.

Q. How often did he call to go out with her?

A. About once a week.

Q. Was this room which she hired of you a bed-room or a parlour?

A. It had a bed in it; but was used as a sitting room.

Q. Was you generally in the room while he visited her, or were they left alone?

A. I was sometimes in the room, and sometimes when I saw them together, not wishing to interrupt them, I walked out.

The testimony of CORNELIUS I. BOGERT was here taken *de bene esse;* and he testified that eight or nine years ago the Plaintiff lived in his family as a mantua-maker, and her character was good.

CATHARINE BADGER, in her direct examination, testified, that in 1807 she lived in Partition-street, and that the Plaintiff lived with her about a year, hiring a separate apartment, and instructing young ladies in the mantua-making business, and was very industrious. During this time the Defendant visited her, and the witness supposed, as a suitor.

Cross-examined by Wells. Had she separate rooms in your house?

A. She had two separate rooms on the second floor.

Q. Did you ever hear him say he visited her as a suitor?

A. No: but I judged from my own observation and from report.

Q. How often did he visit her?

A. I cannot say precisely how often; but I think it must have been more than once a month; I do not think he was absent so long at any time.

By the Court. How often did you say he visited her?

A. I cannot tell; but I think more than once or twice in a week, while she was there.

Examined by Price. Do you know of his having visited her, as a suitor, at any other time than you have mentioned?

A. In the years 1808 and 9, while I lived in Warren and Cedar streets, the Plaintiff spent two summers with me, and the Defendant then visited her as a suitor.

Q. Do you recollect who went with her to Brunswick?

A. I do not.

Wells. Are you sure that you saw Mr. Bogert in your house in Partition-street, visiting her?

A. I am certain that I did.

Margaret M'Cready sworn.

Price. Did Miss Mount ever live at your house?

A. She lived at my house in 1808 and 9. She came in November, 1808, and staid until July or August following.

Q. Did Mr. Bogert visit her as a suitor?

A. He visited her constantly; I thought, as a suitor.

Q. How often should you think?

A. Sometimes two or three times a week, or oftener.

Q. Did you see any thing in particular which induced you to think he visited her as a suitor?

A. Yes: he used to come when she was absent and inquire for her: at one time I saw them together at the street door, and overheard him press her *to fix upon some time:* he used to make her presents of fruit and cakes; and sometimes he visited her in the day time in company with his niece, Mrs. Aymar.

Cross-examined by Wells. Did Mrs. Aymar come with Mr. Bogert?

A. I cannot say; but I have seen them there together at tea.

Q. Where did you live at that time?

A. In Pine-street.

Q. How often did you see Mrs. Aymar there?

A. Four or five times.

Q. Did any other gentleman besides the Defendant, visit her?

A. I never saw any other.

James R. Stewart sworn.

Price. When did you first become acquainted with Miss Mount?

A. In May, 1816, I lived in the same house with Mrs. Maverick, at No. 72 Liberty-street, and Miss Mount boarded in my family about a year, when we moved away: Mr. Bogert visited her frequently; and, I had every reason to believe, as a suitor.

Q. Did you ever see him kiss her, when he took leave?

A. I did not.

Q. Do you know of any present given by him to her?

A. I think he gave her once, a bunch of grapes: he always appeared very attentive.

Q. Do you know that any of his relations visited her with him?

A. I do not.

Q. Was he in the habit of seeing her home?

A. Yes, frequently.

Q. When they returned together in the evening, how long did they sit together?

A. Never after ten o'clock.

Q. Do you know of her making preparations for marriage?

(Emmet objected to the inquiry, and the court decided it was proper.)

A. I understood, preparations were making for her marriage.

Cross-examined by Wells: Had she any separate room in your house, in which he used to sit with her?

A. No: they used to sit in my parlour, and they never sat in any other room, except once, in one which was occasionally used as a sitting room.

Court. How often did he visit her in your parlour?

A. It was so often, I could hardly give a guess; but I should think, it was once a week, at least, on an average.

Q. Were those visits to you, or any member of your family?

A. To Miss Mount ;—for to me, and my family, he was a stranger.

JOHN DOVER sworn.

Price. How long have you known Miss Mount ?

A. Twenty years.

Q. Had you a conversation with the Defendant, on the subject of this suit, and if so, will you state the particulars ?

A. About a year ago, I met the Defendant, who is my brother-in-law, casually, at the corner of Cedar-street and Broadway, and spoke to him about my endeavouring to effect a compromise of this suit. I told him, it was a scandalous thing to come into Court, that it ought to be made up, and that I would try, if he wished, to get it compromised ; he agreed to what I said, wished me to try and effect a compromise, and said that after he had been served with the writ, he was willing to come forward and fulfil his contract ; I asked him why he had not fulfilled his contract before ; to which he answered, that his family was opposed to it, and wished me to try and get it settled. Proposals of different sums passed between the Defendant and myself, of from $1300 to $1600.

Mr. Wells objected to this evidence, on the ground, that offers made by way of compromise ought never to be given in evidence.

By the Court. I think this conversation is not within the rule ; the proposition here, in the first instance, moved from the Defendant himself ; the witness was never authorized by the Plaintiff to effect a compromise, but met the Defendant casually in the street, and entered into this conversation. The offers of compromise, pending a suit, which cannot be received in evidence, I have always understood to be, the mutual communications between parties. (To the witness.) Did I understand you, that the Plaintiff ever authorized you to treat with the Defendant ?

A. She never did. As I said before, different propositions passed between the Defendant and myself ; when I asked him, if he would give her $1600, and he said, if he did, he should commit himself, and told me to talk to his attorney ; I told him, he had already committed himself, by failing to fulfil his contract ; and I asked him, if he would pay that sum, if I could get the Plaintiff to agree to it, and at length, he agreed to do so : I then called upon his attorney, and mentioned the conversation I had with the Defendant.

Price. When he spoke of the interference of his friends, did he seem affected ?

A. He was in tears.

Q. What is the value of his property ?

A. I cannot tell.

Q. Is he worth $100,000, or $10,000, or $20,000, short of that sum ?

A. It may be $80,000. His father died four years ago, and left him a large property.

Cross-examined by Bogert. Did not the communication between yourself and the Defendant, relative to the compromise, originate, in the first place, on your part ?

A. It did : when I spoke to him, he said he was perfectly willing to settle, and authorized me to settle. I wanted to be certain : and he said that he would pay $1600, and all costs, and that I might depend on it. I communicated this to the Plaintiff, and she rejected the offer, asserting that she was an injured woman, and that her character had suffered by keeping his company 13 or 14 years. Afterwards, I mentioned to Bogert, the Attorney, about her refusal, and said, that had I been in the place of the Defendant I would have given $3000, and have done with it ; but the Attorney said, that he would not.

Q. When he spoke about fulfilling his *contract*, what contract did you understand this to be ?

A. A contract of marriage.

Q. Did he state, how it was to be fulfilled ?

A. No : but he said she would not accept.

Q. Are you the confidential adviser of the Plaintiff ?

A. No.

Q. Is she intimate at your house ?

A. She visits there perhaps once or twice a week.

Q. Have you had any difficulty with the Defendant ?

A. No ; I have always been on terms of friendship with him, and the whole family.

Q. Have you a claim against his father's estate?

A. I spoke to the Executors of that estate, and he was one of them, about a claim of dower for my wife, but have not received an answer. I have had no difficulty on that account.

Q. Have you ever heard her make use of any expressions disrespectful to the Defendant?

A. I never have, except after the suit had been commenced, when I heard her say that he was a rascal: that she was an injured woman by keeping his company thirteen or fourteen years.

Here the Plaintiff rested.

Bogert opened the defence, by stating that the Defendant would introduce evidence to show that the Plaintiff had, on all occasions, expressed herself in terms of such marked disrespect towards the Defendant, that even if the Jury should believe that he had contracted to marry her, he could not do so consistently with his own honour and that of his family.

JOHN DARG sworn.

Examined by Bogert. Are you acquainted with the parties in this suit?

A. Yes.

Q. Did you have a conversation with Jane, about the year 1807, concerning the Defendant? If so, state the particulars.

A. She used to come to my house, and we used to ask her how she came on about her marriage with Mr. Bogert, and when they were to be married. She said she detested him, could not bear him, he was disagreeable, and she would not have him if he was worth all New-York. And when I advised her to marry him, she would say, "Would you advise me to marry a man I cannot bear?" This has been her constant language concerning him for ten years. I have heard her say she would not have him if every hair on his head was hung with diamonds.

Emmet. Seriously?

A. Yes; I thought so at the time. I told her that he was rich, and if she married him she could be a lady; at this, she would get angry, and speak of him as I have mentioned.

Q. Did you ever hear her say she was ashamed of him in company?

A. Yes.

Q. Did you ever hear her ridicule him?

A. I have: she used always to be running him down, and making fun of him. I heard her say that he was mean and stingy, and unfit for society. About eighteen months or two years ago, I heard her say that she once made a contract with him, upon condition: she had consented to marry him, if he would take her out of the family and live elsewhere; but he said he could not, as he had always lived in his house in Broadway; and she said this ended the contract.

Q. What is her temper?

A. I know nothing of her temper, except what I heard from her in my house. She seemed to be displeased when I seemed to doubt her stories.

Cross-examined by Price. Was you her confidant?

A. She used to speak to me in confidence.

Q. Did she converse with you frequently on the subject of the courtship?

A. About two years ago, as I think, on one occasion, at my house, she talked on this subject from three o'clock in the afternoon until eleven at night, constantly. I got tired of her, and went out of the house to avoid hearing her, and whenever I came in she was still talking about it. She was then at my house as a mantua-maker, and I do not know that she ever worked there more than once; but I think that within ten years, she has been there fifty times. In those conversations she used to say, that he had made engagements with her which he had broken off several times.

Q. Did the Defendant ever tell you he had contracted to marry her?

A. He did not; but on the contrary he said he had not. I talked very little with him.

Q. Did you ever hear Miss Mount say that he had contracted to marry her?

A. She said, that if he would take an oath that he did not make a promise of marriage to her, she would abandon the suit and pay the costs.

Price. Did she lately appear much dejected?

A. She always looked rather thin.

Hoffman. How long ago is it since you had the conversation with her, wherein

she said she would have nothing to do with him ?

A. I have heard her say so fifty times.

Q. I mean, how long since the last conversation ?

A. I do not think it was more than two years ago : it was about a year before I heard of this suit.

PHEBE CRANE sworn.

Examined by Bogert. Be so good as to state what conversations you have had with Miss Mount, wherein she expressed herself disrespectfully concerning Mr. Bogert ?

A. I have heard her say, one day, that she would marry him, and the next that she would not ; and that he was the last man in the world she would marry. I have heard her say, but not within two years past, that he looked like a May pole with an apple stuck on the top : that he was like a liberty pole with an umbrella on it : she was constantly calling him every thing mean and contemptible. I have seen her take a pair of tongs and put a hat on it, and say, " See, there is Mr. Bogert." She said that he had had his head in the oven for fifteen years, and it was not baked hard yet, for he was quite a fool : that he was a double-tongued Dutchman, who would make her ashamed in company : that she would not ask him to come in, for fear of being put to shame in company ; and that he was good for nothing but making money.

Q. What is her temper ?

A. I have seen her in a violent temper ; but, I cannot say it was on this subject. I have seen her in a violent rage ; insomuch, that she scarcely knew what she said. She might have had cause.

Court. Then we are to understand you, that her temper is bad ?

A. Yes.

Q. In these conversations, wherein she spoke of the Defendant as you have mentioned, do you think she was serious ; or, was it as an answer to your teazing her about him ?

A. I never teazed her ; and considered she was serious : I have heard her speak of him in this manner fifty times. About a week before she sued him, she desired me to tell him, from her, that he need not be a running about from house to house after her, for she would have nothing more to do with him. I declined, and told her to deliver her own message.

Price. When was the first conversation you had with her, wherein she spoke disrespectfully of the Defendant ?

A. Perhaps fifteen years ago, or more : it was ever since I heard of their courtship. It was her general discourse, and I often reproached her for her inconsistency. Mr. Bogert used to be at my house very often with the Plaintiff, and has sat there with her an hour or two ; and I *have never heard her talk to him, as she did to me about him.*

Court. What time is it, since you have heard her say any thing disrespectful of the Defendant ?

A. I think it must be about two years last May.

Price. From any conversation you have had with Miss Mount, did you understand from her, that she was going to be married to Mr. Bogert ?

A. I understood from her, that it was to be a match ; but did not understand there was any time fixed on.

Q. Did she ever invite you to come and see her, when they should commence housekeeping ?

A. I do not remember that she did.

Q. Did she ever tell you, that he had broken off the engagement ?

A. No.

Bogert. Did you not communicate to the Defendant, what you heard her say about him ?

A. About eighteen months ago, I think, and, after the suit was brought, I told him that she had ridiculed his person.

DAVID HUNT sworn.

Examined by Bogert. How long have you known Miss Mount ?

A. She has visited my family ten or twelve years.

Emmet. How old is she ?

A. I should call her about forty-three.

Bogert. Did you ever hear her mention any thing disrespectful of the Defendant ?

A. I never heard her speak of him in any except a disrespectful manner. I often advised her to marry him ; but, she declared she would not marry him, if there was not another white man in the city. She said she would not marry him if he owned all New-York.

Q. Have you not heard her apply to him some particular opprobrious epithet ?

A. She found fault with every part of him; his figure—his dress—his appearance—his address and talents.

Q. Was she serious ?

A. She appeared serious and candid. She said, that she hated and despised him, and that she had tried to affront him ; but he would follow her ; and she was ashamed to be seen in his company in the day time ; and she would never marry him. He used to visit her and walk out with her in the evening, and stay till ten. I advised her as a friend to marry him ; but, she uniformly ridiculed him for ten years ; and until within about two years past.

Price. Did you, on your passage from Newburgh in the steam boat, say that the Plaintiff ought not to recover ?

A. I did not say she *ought not to recover ;* but, I did say, that *I did not think she would recover much.* She worked at my house about two years ago ; and I seriously advised her to be off or on with him entirely.

The evidence on both sides closed.

Wells. Gentlemen of the jury, I think you have heard enough of this case, to convince you, that it is not calculated to awaken your feelings, or excite your sympathy in favour of the Plaintiff. On her part, she cannot allege affections engaged, expectations excited, and future prospects blasted by his violated vows ; nor has he aught of youthful indiscretion to plead in extenuation. But it appears, that on his part, for a number of years past, a cold platonic love induced him to visit her; she received his visits with equal ardour, and, when absent, ridiculed and reviled him ; and now, at this late hour, the fair penitent complains of this "gallant, gay Lothario," of fifty-three, for his violated engagements. I believe, gentlemen, with the evidence before you in this case, you will say, if she has been fooled, the fault lay at her own door ; and, if she suffered in her feelings and reputation, she alone was the author of her sufferings. When she was pressed by her friend Hunt to marry the Defendant, did she then complain, that he had violated his engagements with her ? No : but she declared, she would not marry him if he was the last white man in New-York. She found fault with his figure, his dress, his appearance, and his understanding : and said, that she hated and despised him. And from such a person, she now seeks to recover heavy damages, for a breach of promise of marriage !

There has been some evidence produced on the part of the Plaintiff, to show the attentions of the Defendant to the Plaintiff a number of years ago, from whence it is intended to infer a promise of marriage ; but there is no positive testimony on this subject before you, except it can be gathered from the testimony of Dover, which I think is so loose that it cannot be relied on. He says, when the Defendant spoke of having offered to fulfil his contract, after the suit was brought, he, the witness, understood this to be a *contract of marriage:* though he admits that the Defendant said the Plaintiff would not accept it. Mr. Dover in this must have been mistaken ; for if, when the Defendant talked about the contract, he meant any other than *the offer of compromise*, which she had refused to accept, then, his head must have been baked indeed.

But it will be contended, that an actual promise of marriage may be inferred from his unwearied attention for such a length of time. Allowing this inference, have we not evidence before us, to show that during the whole time his attentions were continued, she was unwilling to marry him. In all her conversations with men, as well as women, she said that she despised him. was ashamed of his company, and had resolved never to marry him : and now she asks of the Jury $10,000, because he will not marry her !

On this branch of the subject, it is unnecessary for me to enlarge, nor need I repeat the abusive and ridiculous epithets applied by this woman to the man who, as she pretends, contracted to become her husband.

In the law, gentlemen, it is essential to the validity of a contract, that there should be two or more parties, who mutually agree : it must be reciprocal, and it is in vain that she alleges that the Defendant contracted to marry her, when it appears she was unwilling to enter into the contract. She produces testimony of a gene-

ral nature, from which the Jury may infer a promise of marriage on our part; we rebut the inference, by showing that on all occasions, she expressed her utter abhorrence of such an engagement, and declared that she would not marry the Defendant if his hairs were hung with diamonds.

When you come to weigh the testimony, gentlemen, I think you must say, that whatever may have been the original intentions of the Defendant while he was continuing his addresses to her, when he discovered that he was treated by her with marked disrespect, when he found himself at all times and on all occasions the butt of ridicule and reproach, he was determined, and that properly, to abandon a connexion which afforded no prospect of happiness. Had she in a fit of mirth and sportive hilarity, and when teazed, spoken of him lightly, she might have been excusable; but it clearly appears, that her sarcastic remarks were serious, and formed the general topic of her discourse concerning him. And we may now emphatically inquire, if she had intended to marry him, would she have treated him in the manner that has been represented? I do really think, that when you duly consider the evidence in this case, you cannot infer that there was a contract of marriage subsisting between the Plaintiff and Defendant, when this action was commenced.

But should I be so unfortunate as to differ with you on this subject, the only question in the case will be, What damages has the Plaintiff sustained? In my view, if we are to rely on the declarations uniformly made by her, his abandonment of the contract, if one existed, ought rather to be a subject of felicitation to her, than regret; for the feelings by which she was actuated towards him, are wholly inconsistent with our ideas of happiness in the connubial state.

This is not the case of a young and artless female, whose affections had been enlisted, whose feelings had been sported with, and who had been betrayed, and finally abandoned by a faithless lover. Such, gentlemen, would have been a case in which the opposite Counsel might indeed have required exemplary damages at your hands. But on this occasion, can this Plaintiff ask remuneration for affections enlisted? No—she had none for the Defendant. For feelings which had been sported with? No—for hers were decidedly hostile towards him. For abandonment and loss of honour? No—she was herself, if not abandoned, destitute of every sentiment of honour. And, gentlemen, I do think that the general complexion of this case will justify me in saying, that this shameless woman, having suffered my client with the most honourable views, to follow her for fifteen years, giving him from time to time encouragement, incited alone by pecuniary motives, now comes into this Court to make a speculation. I trust, gentlemen, in your good sense and discretion, to disappoint her in such an expectation.

Emmet, in his address to the Jury, said that the Plaintiff, in rejecting the overtures of accommodation made by the Defendant, manifested a determination to speculate on his property. She had endeavoured to show a fifteen years' courtship, which, of itself, is evidence that no contract of marriage existed; for within this period, surely she could have brought matters to a bearing, and, as it seems she was pressed on the subject, could have *fixed on the time*. But, it seems, she was willing to wait on this youthful lover of fifty-four—to keep him in hopeful dalliance and fond expectation, until his passion had subsided; for it was convenient for her to have a man following her who had money!

Within this time, she had no other offer which she rejected by reason of a pre-existing contract with the Defendant; nor can she complain of that loss of happiness, which alone forms the basis for damages in cases of this description. This is not the case of a forlorn, broken-down, and broken-hearted creature, with all her future prospects of happiness blasted, and with fame and honour lost by the perfidy of a lover, seeking remuneration from a Jury. No, gentlemen, here no affections were enlisted—no fond hopes and prospects destroyed—and no vows broken; for in this the heart had no share. False and faithless, she received the addresses of the Defendant, and suffered him to dance attendance on her for fifteen years, while she hated and despised him: and

after all this, when she finds that within a few years past he has inherited a large property, actuated by the meanest motives, she now seeks to get the *money*, without the man.

Ask yourselves, gentlemen, whether, placed in the situation of my client, you could take to your bosom such a friend and companion. When you had ascertained that, on all occasions, you had been treated with derision and contempt; when your person and even your understanding had been made the subject of loquacious irony and invective in every company, by one whom you had thought of making your wife—I say, the moment you discovered the secret of her heart, would you not consider it justifiable at once to break off the connexion, and meet her in a court of justice?

This woman tells another, that the Defendant had his head baked in an oven fifteen years; and it will be observed, that the commencement of this period was exactly the time when his attentions began. For a girl in her teens, in mirthful ridicule, to speak of one, concerning whom she had been teazed, and for whom she had a regard, is not extraordinary; it was less excusable in a woman of forty-three; but, if a girl of sixteen should, on all occasions, ridicule not only the person, but the understanding of her lover; nothing but a passion blind and impetuous, which we are not to expect from a man of fifty-three, could induce him to overlook the indignity. And, I do think, that a woman who entertained the impressions concerning the Defendant, which she uniformly expressed, could never have been happy, if united with him in the matrimonial state.

The Counsel, in the conclusion, contended, that even should the jury believe that a contract of marriage existed, the conduct of the Plaintiff absolved the Defendant from his obligation.

Ogden and Hoffinan, in summing up the case to the jury, did not deny, but that the object of the Plaintiff in bringing this suit was a remuneration in damages. Two questions arise in this case: 1. Has the Defendant promised to marry the Plaintiff?—2. If so, what damages ought she to recover?

There was a contract of marriage: this was admitted by the Defendant in his conversation with Dover, who understood the *contract* spoken of as a *contract of marriage;* and further says, that, when the Defendant spoke of the interference of his friends, *he was in tears.* The existence of the contract further appears, by the testimony of Darg, who states, that she declared, if the Defendant would swear that he did not promise to marry her, she would abandon the suit, and pay the costs. But, if no other proof of a contract existed, his unremitted attentions for such a length of time, afford ample evidence of the fact.

Should the jury believe, that he contracted to marry her, there must be a verdict for the Plaintiff; the only question is as to the amount. In extenuation of damages, it is alleged, she treated him ill. This was, because he had made engagements with her, which he violated; and the jury, by a reference to the time, will observe, that when she uttered things disrespectful of the Defendant, she spoke under the strong irritation arising from a breach of contract on his part. This appears by her declarations to one of the witnesses at least. But, whatever might have been the feelings manifested towards him, at the time spoken of by the women, it appears, that, a short time previous to the suit, a reconciliation took place, and he contracted to marry her. The reason why he declined, was not because she had ridiculed him, but, because his friends interfered.

It had been asserted, that her object is to speculate on the fortune of the Defendant. Had this been her object, she would not have rejected the overtures made on her behalf by Dover, but would have instructed him to stipulate for her to a higher amount than had been offered. This was the time to speculate; but instead of this, we find her rejecting the offer made, and declaring she was an injured woman.

In a case of this description, there is no fixed criterion for damages. These rest solely with a jury, under a consideration of all the circumstances of the case.

Her character, he has not dared to assail: it is proved to be fair and unsullied. At her season of life, though the impetuous passions incident to youth do not pre-

dominate in the mind, still, the strength and ardour of an affection chastened by age, is unimpaired; and experience informs us, that the prospect of happiness in the married state in middle age, is far greater than in youth. Her hopes and expectations of happiness, in the married state, have been destroyed by the Defendant; and her affections have been sported with. For this, she asks remuneration from a jury of her country. That jury have it also in their power, and, in a case of this description, it is their duty, to lay a heavy hand on the Defendant, by way of public example.

By the Court. Gentlemen of the jury: This is an action for a breach of promise of marriage. This, in its nature, is considered, in law, as a civil contract; and its existence may be inferred from circumstances. I should have no hesitation in saying, that, from the length of time the Plaintiff was visited by the Defendant, the jury might infer, that such contract existed: at the same time, it is competent for the Defendant to rebut this inference, by other testimony.

What, then, is the nature of the testimony adduced by the Defendant, for that purpose. We have the testimony of three witnesses, at least, that until within two years past, whenever she spoke of him, she made him the subject of derision; and held him up in the most ridiculous and contemptible manner that can be conceived. It would be needless for me, gentlemen, to advert to the manner in which she represented him, or to the expressions of abhorrence used by her: these must be fresh in your recollection. Now, this is evidence produced for the purpose of rebutting the inference of a promise of marriage, arising from the Defendant's continued attentions. And, the question arising here, is, whether you can believe this would have been the conduct of a woman towards a man who had engaged to make her his wife? It is to be observed, however, that the testimony thus far adduced, on behalf of the Plaintiff, is for the purpose of establishing a contract by implication: but the parties do not stop here. Mr. Dover is produced as a witness, who speaks of a contract admitted by the Defendant, which the witness understood to be a *contract of marriage.*

From this and the other testimony in the case to which the court will direct the attention of the jury, it will rest with them to say, whether a contract of marriage existed between these parties previous to the commencement of this action. Mrs. Crane and another witness both declare, that the Plaintiff, before the suit was brought, repeatedly said, that she would never marry the Defendant, and expressed her utter detestation of him.

From this evidence, after an impartial review of all the circumstances in the case, you are to inquire whether, at the time this suit was commenced, there was a subsisting contract between these parties, *and to which she had assented*, to intermarry with each other: for if she was not a party, then this action is not sustained. On behalf of the Plaintiff, much reliance is placed on the admission of the Defendant to Dover; but if even the Jury should believe that the Defendant did make the admissions and treat with this witness, in the manner he represents, still, if the contract of which he speaks was not mutual between the parties, by an assent of the Plaintiff, she cannot support this action.

But should you believe, from the evidence before you, that when this suit was brought, a contract of marriage subsisted, the Plaintiff must recover a verdict: in that case, the remaining inquiry would be as to the amount of the damages. In a case of this description, where the future hopes and expectations of a woman in the married state have been blasted, and her happiness destroyed, there heavy and exemplary damages ought to be awarded. But in this case, can you believe that the future hopes and prospects of happiness of this Plaintiff, have been sacrificed? If she entertained the contemptible opinion of him which she expressed to several of the witnesses, she has escaped a curse, instead of losing any benefit. But I again repeat to you, gentlemen, that should you believe that a contract of marriage existed between these parties, at the time this suit was brought, your verdict *must* be for the Plaintiff—the amount is within your province exclusively.

The Jury rendered a verdict in favour of the Plaintiff for—$400.

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But in such case, on the day for showing cause, it is the practice for the public prosecutor to proceed to point out the

matter alleged as a contempt: and if the party charged doth not show sufficient cause, or purge the contempt, (should it be so considered by the court,) the rule for an attachment will be ordered; on the return of which process, the district attorney proceeds to file interrogatories with the clerk, to be read by him to the party on oath. But, on the day for showing cause, the party, by showing sufficient cause, or purging the contempt, may have such rule discharged, *ib.*

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District Attorney.

By the first section of the "act relative to district attorneys," passed April 9, 1813, (1 vol. R. L. p. 413,) the state of New-York is divided into certain districts, in each of which a district attorney was to be appointed, and the city and county of New-York, and the counties of Suffolk, King's, Queen's, and Richmond, are declared to constitute the first district. This act further prescribes the several duties of that officer; and, in the third section, provides for the payment for his services. By the "act concerning criminal prosecutions, in the counties of Suffolk, King's, Queen's, Richmond, and New-York, and for other purposes," passed March 24th, 1815, (L. N. Y. Session of 1815, p. 89,) it is declared, "that for all the objects and purposes declared and contemplated by the act en-

titled, 'an act relative to district attorneys,' the counties of Suffolk, Queen's, King's, and Richmond, shall be one district, and the city and county of New-York shall be another district: and that a district attorney shall accordingly be appointed in each one of the said districts." On the 21st of April, 1818, the legislature passed an act, (L. N. Y. Session of 1818, p. 306,) entitled "an act to amend an act relative to district attorneys;" in the first section of which it is enacted, "that the person administering the government of this state shall, as soon as may be after the passing of this act, by and with the advice of the council of appointment, appoint and commission a proper person to the office of district attorney *in each of the counties of this state*, who shall enter on the duties of his office on the first day of July next, each of whom shall be of the degree, &c., and resident, &c. And it shall be the duty of the several district attorneys to attend the courts of Oyer and Terminer and General Sessions of the Peace, to be held within the counties for which they *are* or shall be appointed respectively, and to conduct all prosecutions, &c., and the commissions hereafter to be issued to each district attorney shall designate the name of the *county* for which he shall be so appointed." The 3d section of this act declares, "that from and after the first day of July next, the 1st section of the act entitled, 'an act relative to district attorneys,' shall be, and the same is hereby repealed." And the 6th section of this act provides, "that the compensation allowed by law to the said district attorneys, shall be paid by the respective counties for which the said district attorneys shall be appointed."

Hugh Maxwell was duly appointed a district attorney, in and for the city and county of New-York, on the 28th of January, 1817, at which time a commission, in the usual form, was issued in his favour by the council of appointment. He continued to exercise the duties of his office under that appointment, until the 6th day of July instant, when Pierre C. Van Wyck produced to this court a commission from the council of appointment, by which he was appointed district attorney, in and for the city and county of New-York, under the act of 1818; and he claimed to be admitted to the exercise of the functions of his office, by virtue of his commission. No supersedeas had been issued to Maxwell, and he claimed the exercise of his duties as district attorney under his commission. It was held, that Pierre C. Van Wyck was the legitimate district attorney of the said city and county, 113

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On the traverse of an indictment against husband and wife, for keeping a disorderly house, it is necessary for the public prosecutor to show either an active co-operation on the part of the wife, with her husband or others, in producing disorder, or that it was of that peculiar nature which must have been the necessary result of such agency on her part: otherwise, she cannot be convicted, *ib.*

Foreclosure of a mortgage.

The sixth section of the "Act concerning mortgages," (1 vol. R. L. p. 374.) prescribing the mode of foreclosure, directs, that "every such sale shall be at public auction or vendue, and public notice shall be given thereof by advertisements, one copy thereof to be inserted and continued, at least once a week, *for six successive months* previous to the sale, in one of the newspapers published in the county where the mortgaged premises lie," &c. It was held that the term months in that statute meant lunar months, 1

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An indictment alleged that S. pretending to C. that he S. had the sum of $25, in

$5 bills in his pocket-book, which bills would not pass without a discount, and, intending to cheat and defraud C. of his money, delivered the said pocket-book to him; and that C. thereupon at the request of S., loaned him $10; supposing and believing that the sum of $25 was in the pocket-book; whereas, in truth and in fact, no money was therein. It was held, that this indictment, on its face, did not contain an offence, against which ordinary prudence could not guard; and that it was not supported by proof that S. immediately before the delivery of the pocket-book, counted out $100 in bills on the Philadelphia bank, in presence of C., and, by a sleight of hand manœuvre, slipped the money into his coat sleeve, unseen by C., who supposed that S returned the money to the pocket-book, *ib.*

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A. had dealings to a considerable amount with a bank, for several years, and was usually in the habit, when he deposited money with the receiving teller, and drew a sum out by check, to pass from his desk to that officer in the bank who received the checks and paid the money, with his bank-book in his hand, which he exhibited for the purpose of showing that his account was good at the bank; and sometimes such officer, on receiving A.'s check, would observe to him, in a delicate manner, "I suppose you have deposited sufficient to answer this check," to which A. would answer in the affirmative, and exhibit his book as evidence of the fact. On the day laid in the indictment, A. went, as usual, to the desk of the receiving teller, and deposited $1,209, and from thence, with his book in his hand, passed to the officer who paid out money, and exhibited his own check for $5,450, and also his book. The money was paid, and no question, at that time, was asked him. On a subsequent examination, it was found that the checks of A., presented and paid on the same day, exclusive of the $5,450, amounted to $6,500; and that he had overdrawn the bank to the amount of $10,722 33, on that day. It was held, that A. was not guilty of obtaining money by false pretences, either at common law or under the statute, 118

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H.

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A defence, resting solely on the ground of insanity, is to be strictly scrutinized. (See 1 Vol. City-Hall Recorder, p. 185.) *ib.*

Insurance on Lottery Tickets.

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On the traverse of an indictment, under the 8th section of "An act to prevent private lotteries, and to restrain insurance of lottery tickets," (2d vol. R. L. p. 190,) it was held that a defendant, who had sold a policy of insurance on a number, thereby agreeing to pay a larger sum of money to the insured than he paid, in case such number was drawn on a particular day, during the drawing of a lottery, was guilty, although the insurance was made for another person, and the defendant was not interested therein, *ib.*

In such case it is necessary to allege in the indictment, that the defendant insured on some *particular number*, to be drawn on some *particular day*; and an indictment is insufficient which alleges that the defendant insured a number *to the jurors unknown*, *ib.*

An indictment under this statute alleged that the defendant insured a particular number, thereby agreeing, that if the said number should be drawn on the 26th of February, then the defendant would pay the insured, &c. On the trial it appeared that the insurance was effected, on the day last mentioned, for the 38th day's drawing in the lottery, which was the 1st of March—held that this variance between the indictment and the proof was fatal, *ib.*

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Where a stranger entered the dwelling-house of a citizen, at night, through a window, and attempted to deceive the wife by representing himself as her husband, and proceeded to other acts which clearly indicated his intention, though these acts did not extend to actual violence,—on the traverse of an indictment against him, consisting of separate counts for a simple assault and battery, and also for the same offence with an intent to ravish, it was held that the jury could not rightfully acquit him of the greater, and convict him of the less offence, *ib.*

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to be intercepted, opened and read : the fourth count, was for obtaining and getting into possession such letter, and *publishing its contents*, and the fifth for thus obtaining and getting in possession the same letter and *publishing it in a public newspaper, with strictures and comments*. On the trial, the evidence on the part of the prosecution did not support the charge in the three first counts, which alone contained an indictable offence, and so expressed by the court in their charge to the jury, who, nevertheless, found a general verdict against the defendant. On an application to the court to grant a new trial, on the ground that such *verdict was contrary to law and evidence*, the motion was granted, *ib.*

It seems that where an indictment consisted of divers counts, some of which contained a charge for an indictable offence, and others not, it is the right of the party, against whom a general verdict may be rendered, to inquire of the jury, on their return, whether they find the defendant guilty on all the counts, or on either, and which of them, and the jury are bound to answer such inquiry, but the party has no right to interrogate a jury as to the particular reasons or grounds of their verdict, *ib.*

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Larceny.

Constructive Larcenies, 129, 154

Though the obligee voluntarily deliver to the obligor a bond, remaining due and unsatisfied, yet should it further appear that the obligee was an ignorant person, and the other practised on her credulity in obtaining the instrument, and afterwards made use of divers evasions when called on by her for the bond or the money, and finally withheld it, falsely alleging that it had been paid to a third person ; should the jury believe, from the circumstances, that, at the time he obtained the bond, he harboured a felonious intent, they may convict him, *ib.*

When your money is safely invested, let it remain, unless you put it in a safer place, *ib.*

Where a lad, under the age of fifteen, who had been taken on trial as a clerk or attendant of a counting-house, but not intrusted with the care of the books, is tried on a charge for stealing a check which had been left in the book, filled up and signed by the principal, and a number of circumstances are produced on behalf of the prosecution, to show that such lad took the check with a felonious intent, and his examination states that he tore the check, which was not signed, out of the book, and tore it up ; still, in favour of a youth of very tender years, if, from other circumstances in the case, it should be rendered doubtful whether he took the check, or, if he did, whether he had any agency in obtaining the money from the Bank, it will be the duty of the jury to acquit him, *ib.*

A lad taken on trial, while in the employ of the principal, was sent by him to carry goods to a particular place ; but the lad took them to auction and had them sold, intending to convert the avails to his own use—it was held, that this was a constructive theft, 154

Where a man, at the time he obtains goods at a store, alleges that if one of the two boys who sold him the goods will go with him to a certain place he would pay for the property : and on the way represents that they were purchased for a rich lady, who would pay, &c. ; should he go off with the property and convert it to his own use, he is liable to a conviction for a felony, should the jury believe that, at the time he acquired possession, he *intended* wrongfully to deprive the owner of his goods, *ib.*

In such case, the prisoner would not be liable to an indictment for obtaining goods by false pretences : the false representation not having induced a delivery of the goods, *ib.*

Letter.

To break the seal and open a letter, containing the secrets or private business of another, is a misdemeanor at common law, 13, 61

But to publish the contents of such a let-

ter, which may innocently come into the possession of the publisher opened, is not a public offence, *ib.*

By the 15th section of the statute of the United States, concerning "Post-offices and Post-roads," (1 Graydon's Dig. p. 341.) it is enacted, that "if any person shall take any letter or packet not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter or packet which shall have been in a post-office, or in the custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence, or to pry into another's business or secrets; or shall secrete, embezzle, or destroy any such mail letter or packet; such offender, upon conviction, shall pay for every such offence," &c. It was held that the jurisdiction of the court of General Sessions over an offence of this description was not ousted by this act; such offence being a misdemeanor at common law, *ib.*

See Jury.

Libel.

Though a letter, technically speaking, is not the subject of a felony, yet, where a publication charged as a libel, alleged that the prosecutor *made use of property known to be stolen*, and it appeared, that this charge had reference to a letter, it was held, that unless justified or explained, such charge is libellous, 27

In such case, the defendant will be permitted to show, that by the *property alleged to have been stolen*, he meant a certain letter, directed to him by another person, which had been surreptitiously obtained; and in doing this, the defendant is not to be confined to the particular publication charged as a libel, *ib.*

A publication, calculated to hold up another to public obloquy, contempt, and ridicule, is a libel, *ib.*

In a printed libel there was a note; and in the declaration, at the point of reference, the matter contained in the note was set forth as a continuation of the libel, without stating that such matter constituted the note—held that this was no variance, 97

Where parts of a libellous publication are set forth in a declaration and other parts omitted, and at the several places of omission no mention is made thereof in the declaration, which proceeds as though the matter succeeding the part omitted was but a continuation of the preceding part set forth in the declaration, it was held that this was no variance, *ib.*

When the defendant doth not attempt to justify or prove a libel true, it is to be considered false, but the plaintiff, for that reason, is not to be precluded from proving the falsity of the charges, *ib.*

To engage a printer, even in a foreign state, to print a libel, is, technically, a sufficient publication to sustain an action, *ib.*

Where the parties in such action are both residents of a foreign state, and the libel is published in such state, the action will lie, *ib.*

To deliver to a wife, in confidence, a libel, is not a publication; but where she herself distributes some printed pamphlets containing a libel, to persons whose names have been endorsed thereon by the defendant, and delivers others with a similar endorsement to the plaintiff himself, who distributes them, the defendant was held responsible for the publication of the former, but not of the latter, *ib.*

Though the jury are not to give damages to a party libelled for any part containing libels against another, yet, in judging of the motives which actuated the writer, the jury may look at the whole publication, *ib.*

The office of an *innuendo* is to *explain*, not to *extend* or *enlarge* the obvious meaning and intent of a publication alleged to be a libel, 161

Where the *gravamen* laid in an indictment for a libel, consisted in a charge of *swindling* against the state managers of a particular lottery, and a sub-manager acting under them, but the obvious import of the publication was a general charge of fraud in lottery management, and of carelessness and mismanagement on the part of the state managers, it was held that the *innuendoes* could not extend the meaning of the publication, touching the charge of fraud, to the state managers, *ib.*

When in such case the charge of carelessness, by which a facility to fraud was afforded to persons concerned in the management of such lottery, acting by permission of the state managers, appeared to be fully established on the part of the defendant, and a variety of facts and circumstances are produced on his behalf for the purpose of showing that *fraud* was actually committed by persons concerned in the management of that and of other lotteries, should the jury believe that fraud was practised by any person in any manner concerned in such management, they will be justified in acquitting the defendant; but should they not believe this, still, if the facts and circumstances produced by him appear sufficient to excite a well-grounded belief of the existence of fraud, and to justify the suspicions expressed in the publication, he will be entitled to an acquittal, *ib.*

In such case, should fraud be inferred by the jury, its developement by the defendant is praiseworthy, and he will be presumed to have made the publication with good motives and for justifiable ends; but if fraud is not inferred, still, if he was not actuated by malicious or mischievous motives, he cannot be convicted of a libel, *ib.*

M.

Manslaughter.

N. P. brought into the grocery store of M. a basket, which he suspected to be stolen from a cart near the store, and he, therefore, thrust the supposed thief from the store, who turned upon him to force his way back. R. P. a bystander, interfered; and, while the other two were struggling near the grocery door, seized hold of N. P. to pull him back, saying, that he would not suffer him to carry into the store stolen property. At this stage of the affray, the owner of the basket came and claimed it. Whereupon N. P. either dropped it, or delivered it to the owner—*the struggle ceased*, and the parties were entirely separated. Then, and in a short time afterwards, N. P. struck R. P. a violent blow on his left shoulder, who asked him the reason of giving the blow, but made no resistance. N. P. still advanced on R. P. and struck him another blow on or under his left ear, who fell backwards, the back of his head striking the pavement, by means of which he died in about two hours. It was held, that this homicide was manslaughter, 145

Marriage.

A promise of marriage may be inferred from circumstances, and need not be proved by positive testimony, 193

Where a maiden woman of forty-three years of age, received the visits of a bachelor of fifty-three, as a suitor, for thirteen years, but, during this time, whenever she spoke of him, declared she would never marry him, and represented him on all occasions in terms of derision and contempt; and where, after that lapse of time, and before the commencement of the suit, the bachelor, not knowing the double dealing of the maid, promised to marry her, but, afterwards, having heard of her aspersions, refused—though the Jury are *obliged* to render a verdict against him for this breach of his contract, yet, they will not amerce him in heavy damages, *ib.*

In such case, where the bachelor had offered the maid, by way of compromise, after the commencement of the suit, $1600, which offer she rejected, the Jury gave her but $400, *ib.*

Mitigatory matter.

Matter, not admissible in justification of an assault and battery, but which goes merely in mitigation of the punishment, will not be received by the court, on the traverse of an indictment for that offence. Such matter should be laid before the court by affidavit only, 73

See Affidavit.

Murder.

On the traverse of an indictment for the murder of a wife, where the evidence is merely circumstantial, and from an impure source, it is the safer course to acquit, 45

See Jury.

N.

New Trial.

—on the merits, in a misdemeanor, can be granted by the New-York Sessions, 13
Where the prisoner moves for a new trial on the ground that testimony was admitted on behalf of the prosecution which the prisoner can show to be infamous, the court will recur to all the circumstances of the case, in judging of the propriety of granting such motion, 96

See Jury—Letter.

Nuisance.

The prevention or abatement of a nuisance, is the principal object of an indictment for that offence, 7
After a conviction for a nuisance, in conducting a lawful business, the court will suspend the sentence a reasonable time to give the defendant an opportunity to abate such nuisance, *ib.*

O.

Ownership.

Though the son be under the age of twenty-one years, yet, if he work for himself, and purchase goods, which are afterwards, and while in his possession, stolen, they must be laid in the indictment as his property, and not that of his father, 192

P.

Perjury.

The oath taken, assigned as perjury, must be material to the question in controversy, and corrupt, or it cannot amount to that crime, 11
P. became a petitioning creditor, to the amount of $950, for R., under the insolvent act, and swore to an affidavit prescribed in the act, before a master in chancery, by the uplifted hand: afterwards, when the time for the creditors of R. to show cause before the recorder of New-York had arrived, and R. applied for his discharge, certain of his creditors opposed him, and produced P. as a witness to prove that R. was not indebted to him. On that occasion P. affirmed before the recorder, that he did not *swear* before the master to the affidavit then produced to him; that he never swore in his life; but that he affirmed; held that P. was not guilty of perjury, inasmuch as it was immaterial to the inquiry before the recorder, whether P. swore or affirmed to the facts in the affidavit taken before the master, *ib.*
The oath assigned as perjury in an indictment was, that the defendant "saw *M. G.* and *M. F.* hand a *trunk* through a window in the rear of the house of J. N. G. on the same night it had been stolen, and that he saw the same trunk handed to J. N. G. through the said window, and that he saw the said J. N. G. place the same in the smoke-house." On the traverse of this indictment it appeared, that on the former trial the defendant swore that he saw a man on the back stoop, (whom he afterwards recognised to be J. N. G.) and *two women* at the window hand him out *something about a foot and a half long which looked like a trunk.* Though this was the subject-matter of the former trial, and was frequently referred to during its progress, it was held that the variance between the oath set forth in the indictment and the proof was fatal, 93
After the testimony on both sides has been submitted to the jury in a case of perjury, they must pass thereon; and the public prosecutor will not be suffered to enter a *nolle prosequi* on the indictment, *ib.*

Prejudice.

—against men of colour justified, 42, 43
Though, in law, free men of colour have equal rights, yet, among white men, in general, in this community, there is an honest prejudice against a further association or connexion with such men of colour than is requisite in transacting business, 37

Presumptive intent to Kill.

The law raises a presumption of an intent to kill, in a case where the means used by the assailant were such as, in all human probability, would have produced death; and where, had it ensued, such killing would have been murder, 73

But, where an aggravated assault and battery was committed, under such circumstances that, had death ensued, it would have been murder on the part of the assailant; still, if it does not positively appear that any dangerous weapon was used, or that the means or manner, employed in the commission of the offence, were such as were calculated to produce death, the jury are not bound to impute to the defendant an implied intent to kill, *ib.*

Presumptive Proof.

To convict a prisoner of a felony, it is incumbent on the public prosecutor to show that a felony has been committed, 137

Where circumstances are relied on by the public prosecutor to establish the commission of a felony by the prisoner, they must be such as are reconcileable with his guilt only, and are utterly inconsistent with his innocence, *ib.*

Drunkenness is the parent of crime, and finally leads to ruin, *ib.*

Procurement.

An intelligence-office keeper, who recommends a young female stranger to a house of ill fame, knowing it to be such, is indictable for a misdemeanor at common law, though such stranger be herself a prostitute, 49

R.

Receiving Stolen Goods.

Receiving a stolen bank bill, knowing it to have been stolen, is not a misdemeanor within the statute. (1 vol. R. L. p. 410, sect. 13.) 59

The mere finding an article stolen in possession of a party charged with receiving it, knowing it to be stolen, without other evidence, is insufficient to produce a conviction, 95

If in such case the property alleged to be stolen be laid as the separate property of W. and on the trial it should appear that the property was that of W. and K. the prosecution cannot be sustained, *ib.*

But inadequacy of price—purchasing new goods of vagabonds from appearance—concealing the goods—agitation when questioned respecting them—all or either of these, if existing, are circumstances indicative of guilt, *ib.*

Recognisance.

The public prosecutor is not bound to bring on a case for trial, until the last day of the term next after that in which the indictment was found; at which time, if the defendant has been ready for trial, and no sufficient cause be shown on the part of the prosecution, the court may discharge him from his recognisance, or from prison, 73

The bail in a recognisance cannot surrender the principal, 128

Riot.

—in a church, 7

Where the grand jury is satisfied that a man, assuming the character of a divine, is the prime cause of riots and disturbances in a building of his own in which *he* officiates as a preacher, in the heart of a populous city, they may indict *him* for keeping a disorderly house: this not being an infringement on the rights of conscience secured by the constitution, *ib.*

Robbery.

Though on the traverse of an indictment for highway robbery it is incumbent on the public prosecutor to show that the prisoner *put the injured party in fear before depriving him of his property*, yet in a case in which it appeared that the prisoner, a stranger to the prosecutor, first blew out the candle, and then seized the prosecutor and wrested his money from his pocket, and afterwards, but nearly at the same instant of time, made use of threats, the jury, in judging whether the prisoner put the other party in fear before or after the money was obtained, are not confined merely to the threats used, as the means by which fear was induced, but may recur to all the other means calculated to put a man in fear, 10

S.

Scienter.

Though on the traverse of an indictment

for passing a forged check it is not sufficient, *generally*, for the public prosecutor to show that the prisoner merely passed it, yet, in such case, very slight circumstances are sufficient to establish the *scienter:* and where during the same term a man is tried on two indictments for passing forged checks, though he may be acquitted on the traverse of the first, on the ground that the *scienter* was not brought home to him—on the traverse of the second, the jurors themselves, without proof, will look to the first trial for a *scienter*, 143

On the traverse of an indictment for passing counterfeit money, for the purpose of establishing the *scienter*, the public prosecutor will be permitted to show that the prisoner, previous to the time laid in the indictment, passed other counterfeit bills: but should it appear that these bills were passed at a time remote from the others, and no circumstance is produced on behalf of the prosecution tending to establish the *scienter* in relation to the principal offence, the jury may acquit the prisoner, especially if he is supported by testimony of good character, 148

Where, in such case, no connexion appears between the offence laid in the indictment and that produced to establish the *scienter*, and the offences appear distinct, however strong may be the evidence of the *scienter* applied to the *accessory offence*, the jury will not be justified in finding the prisoner guilty of the *principal offence*, *ib.*

The prisoner cannot be convicted of an offence not laid in the indictment, *ib.*

Sessions.

The Court of General Sessions, in and for the City and County of New-York, have a right, in a case of a misdemeanor, to grant a new trial on the merits, 13

Statute of Frauds.

—extract from, 72

P. purchased a boat of Platt for $50, and paid $30 down, and drew his promissory note for the balance, payable at thirty days, upon which note Platt requested security, and P. sent to W. and, in presence of Platt, asked W. if he would become his security, who refused to endorse any note as security, but said that he would see the money paid at the end of thirty days, if P. did not pay it—the boat was delivered. Though a recovery was had on this promise of W. before a justice, the judgment in this court was reversed, 76

Entering into possession under a parol agreement to convey, continuing in possession, making improvements, and paying moneys towards the land to the owner, who, immediately preceding the time the complainant entered into possession, procured the land to be run out by a surveyor, are acts of part performance, which, in equity, will take the case out of the statute, 156

Supersedeas.

See District Attorney.

Swindling.

—charged in the management of lotteries in this state, 161

See Libel—Fraud.

T.

Trespass.

To cut off and carry away lead from the roof of a building is not a felony; but if, after the separation, the lead is left near the place, and subsequently carried away feloniously, this is a felony, 58

V.

Variance.

See Perjury.

Venue.

In an indictment for keeping a disorderly house, the place is of the very essence of the offence, and the ward should be correctly laid, 128

W.

Witness.

A witness, who, in open court, makes use of vulgar obscene language, which he imputes to another, whose declarations

he undertakes to recite in a continued relation, but without being required to state the precise words, will be ordered into custody, 49
Though the public prosecutor cannot introduce other witnesses *for the purpose of discrediting* a witness on behalf of the prosecution, yet he is not precluded from *contradicting facts* previously sworn to by his own witness, 153
Where a case, on the proof, stands *as strong as possible*, it is injudicious, and sometimes ruinous to attempt to make it *stronger*. (See 1 Vol. of the City-Hall Recorder, p. 62,) *ib.*

See Infant.

END OF THE THIRD VOLUME.

THE

NEW-YORK

CITY-HALL RECORDER,

FOR THE YEAR 1819.

CONTAINING

REPORTS

OF

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WITH NOTES AND REMARKS, CRITICAL AND EXPLANATORY.

BY DANIEL ROGERS,
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